

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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|---------------------------|---|------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | Criminal Action |
| |) | |
| v. |) | No. 05-_____-01-____ |
| |) | |
| MAX L. ARY, |) | <u>Counts 1, 9</u> |
| |) | 18 U.S.C. §1343 |
| |) | |
| Defendant. |) | <u>Counts 2, 4, 6</u> |
| _____ |) | 18 U.S.C. §1341 |
| | | |
| | | <u>Counts 3, 8</u> |
| | | 18 U.S.C. §641 |
| | | |
| | | <u>Counts 5, 7, 10</u> |
| | | 18 U.S.C. §2314 |
| | | |
| | | <u>Count 11</u> |
| | | 18 U.S.C. §981 |

INDICTMENT

The Grand Jury alleges:

Introduction

At all times material to these allegations:

The Cosmosphere

1. The Kansas Cosmosphere and Space Center (referred to hereafter as “Cosmosphere” and “KCSC”) is a museum dedicated to space science exhibits and educational programs. It is located at 1100 N. Plum in Hutchinson, Kansas. The

Cosmosphere offers the public various exhibits and programs which include, but are not limited to, a planetarium, an IMAX Dome Theater and the Hall of Space Museum. The Cosmosphere is a not for profit corporation which, beginning as early as February of 1999, has received more than \$10,000.00 annually from the United States government.

2. The Cosmosphere was founded in the 1960's and initially referred to as the "Hutchinson Planetarium." It was incorporated under the laws of the state of Kansas as the "Hutchinson Arts and Sciences Foundation, Inc."

3. The Articles of Incorporation established several goals for the corporation, including, but not limited to:

....

d. To receive donations; and, to receive, manage, take and hold real and personal property, by gift, grant, devise, or bequest; and also, to receive, hold, manage, convert, sell, assign, transfer, alter reinvest and otherwise deal with all the properties held by the Corporation, and all additions thereto, as in the discretion of the Board of Directors shall be deemed to promote and accomplish the purposes of the Corporation;

e. To retain the original properties received by it from donors for such time as the Board of Directors of the Corporation shall deem best, at all times and from time to time, to sell, convert, reconvert, partition or exchange, any property at any time comprising a part of the assets of the Corporation, or any part or parts thereof, or any claim or interest the Corporation might have in such property, and to make, execute and deliver all such instruments as the Board of Directors may deem necessary or expedient for such purposes, and to make contracts with reference to the property belonging to the Corporation, or any part thereof, as the Board of Directors may see fit;

f. To participate in the liquidation, reorganization, consolidation

or other financial readjustment of any corporation or business in which this Corporation is, or shall be, financially interested;

g. To invest any money which it may have at any time in such bonds, stocks, notes, real estate mortgages or other securities, or in such other property, real or personal, as the Board of Directors shall deem wise;

....

4. The Articles of Incorporation further stated that:

PROVIDED, HOWEVER, That, anything herein to the contrary notwithstanding, in no event and under no circumstances shall any part of the funds, property or assets owned or acquired by the Corporation, whether principal, income or accumulation, or the net earnings thereof, be distributed to, or inure to the benefit of

(1) Any donor to the Corporation or his heirs or personal representatives;

(2) Any Director or Officer of the Corporation;

(3) Any corporation, association, organization, society, trust or agency, unless it be organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or for one or more of such purposes, and/or for the encouragement of art or the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation;

..... and no part of the funds, property or assets of the Corporation, or the income therefrom, shall be expended for any purpose other than those herein designated; ...

SIXTH: In the event of the dissolution of this Corporation, then all of the property, funds and assets of the Corporation at the time of such dissolution, shall be distributed exclusively for

religious, charitable, scientific, literary and/or educational purposes as the Board of Directors of the Corporation may direct.

5. The Articles of Incorporation were reinstated, amended and renewed throughout the years. The sections referenced in paragraphs 3 and 4 of the Introduction to this Indictment did not change. However, the name of the corporation was changed to “Kansas Science and Arts Foundation, Inc.,” and later “The Kansas Cosmosphere and Discovery Center, Inc.”

6. On or about August 25, 1986, the corporate name was changed to the current “Kansas Cosmosphere and Space Center, Inc.”

7. During October 1997, the “Kansas Cosmosphere Foundation” was incorporated under the laws of the state of Kansas. The location of this foundation was and is the same as that for the Cosmosphere. The defendant, Max L. Ary, was the named resident agent.

8. The stated purpose of the Foundation, found in paragraph (1) of the Articles of Incorporation, was and is “[t]o receive, hold, use, invest and distribute funds, property, real and personal, and income, from individuals, estate, fiduciaries, trusts, and entities of all kinds whatsoever, all for the benefit of and support of Kansas Cosmosphere & Space Center, Inc. a Kansas NOT for profit corporation which is exempt from U.S. income taxes under 501(c)(3) of the U.S. Internal Revenue Code and which has been ruled not a private foundation by reason of the fact that it is an organization described in Section 170(b)(1)(A)(viii) of the U.S. Internal Revenue Code.”

9. In addition, the Foundation was organized to “receive, lease, manage, take and hold real and personal property, in or outside the State of Kansas by purchase, exchange, lease,

gift, devise or bequest and to convey, sell, exchange, lease, assign, transfer, improve, reinvest and otherwise deal in and with all of the property held by the Corporation, and all additions thereto, if in the discretion of the Board of Directors, it be determined most appropriate to promote and accomplish the purposes of the Corporation.”

10. Finally, in paragraph (7), “[a]ll funds, property, real and personal, and income distributed to or for the benefit of the organization designated in paragraph (1) [Kansas Cosmosphere & Space Center, Inc.] of this Article shall be earmarked for a particular program, activity or other general need of the organization, even if such program, activity or need is not the beneficiary organization’s primary program, activity or purpose so long as such program, activity, or other general need is a substantial one.”

The Defendant

11. The defendant, Max L. Ary, was hired to manage the Cosmosphere as early as February of 1976. The defendant was an officer and director of the Cosmosphere, with the titles “President” and “Chief Executive Officer.” The defendant’s employment continued until his resignation in September of 2002.

12. As an officer and director of the Cosmosphere, the defendant developed the museum, its artifact collection and the inventory control processes. As the collection grew, the defendant maintained almost exclusive control over the artifacts.

13. The Cosmosphere’s Board of Directors relied on the defendant’s expertise and trusted him to protect and preserve the Cosmosphere’s valuable artifact collection and assets.

14. Beginning as early as 1982, the Cosmosphere entered into signed employment

agreements with the defendant. These agreements specifically described the defendant's compensation package which included a salary, insurance, a yearly bonus, a percentage of revenues from all sources, a membership at the Prairie Dunes Country Club, an automobile, and reimbursement for travel, entertainment and miscellaneous expenses.

15. The employment agreements established the defendant as the executive director with "his powers and duties in that capacity to be such as may be determined from time to time by the board of directors" of the Foundation and/or the Cosmosphere. During the term of the agreements, the defendant specifically agreed to devote his best efforts to advance the interests of the Foundation and the Cosmosphere, and to not, directly or indirectly, be engaged or concerned with any other commercial duties or pursuits without the prior approval of the board of directors of the Foundation and/or the Cosmosphere.

16. Although the defendant was a member of the Board of Directors, by virtue of his position at the Cosmosphere, he was not allowed to attend meetings where his compensation was discussed. The defendant was not permitted or authorized to vote on matters related to his compensation.

17. As early as May 25, 1988, the defendant, as the President of the Cosmosphere, recognized the importance of not allowing space artifacts to enter the market as private property for private enjoyment. In a letter to a private citizen, the defendant wrote the following:

I think you can well understand that actual space artifacts are extremely rare and quite valuable. During the past twelve years, we have worked harder than anyone in trying to find, preserve

and display many of these valuable and irreplaceable artifacts. Needless to say, we go to great lengths to protect them. We want to make sure as few as possible get into private hands so that we don't see a business starting to develop in the selling of space artifacts. I think this would be most inappropriate, and will directly hinder the public display of many of these important pieces.

The Artifacts

18. The Cosmosphere possesses a significant collection of United States and Soviet space artifacts. This collection includes the Apollo 13 command module Odyssey, the SR-71 Blackbird #961, and rare V-1 and V-2 rockets. It also has on display a complete set of Mercury, Gemini and Apollo spacecraft juxtaposed with a complete set of Russian Vostok, Voskhod and Soyuz spacecraft.

19. Artifacts in the Cosmosphere's extensive collection were obtained from numerous sources, including private donation, purchase by the Cosmosphere and loans from other institutions. Other institutions which loaned artifacts to the Cosmosphere include the Smithsonian, the United States Air Force, the National Air and Space Museum (NASM), the International Space Hall of Fame (ISHF) and the National Aeronautics and Space Administration (NASA) through the Johnson Space Center in Houston, Texas.

20. The Cosmosphere acquired numerous artifacts from General Services Administration (GSA) and the Kansas Federal Surplus (Federal Surplus).

21. Since the number of artifacts in the Cosmosphere's collection is significant, not all artifacts are on display at any one time. Artifacts not on display are in the main storage units of the museum (which housed two safes) or an offsite location at 711 West 2nd Street,

Hutchinson, Kansas. Access to the storage areas is limited. However, while the defendant was the Cosmosphere's director and officer, he had direct access and control over the entire collection, with the exception of the items stored in the two safes. The defendant did not have the combination to the two safes and could not access the safes' contents without the knowledge of other Cosmosphere employees.

NASA Loan Agreements

22. The National Aeronautics and Space Administration (NASA) is an agency and department of the United States of America. NASA is responsible for developing and conducting space exploration on behalf of the United States government.

23. From time to time, items used in the exploration of space became unnecessary for continued use in NASA's ongoing space program. As a result, NASA developed a relationship with museums throughout the country whereby it loans space artifacts to museums or other educational institutions so that the artifacts may be displayed to the public.

24. When NASA loaned artifacts from the United States space program to the Cosmosphere, the Cosmosphere was required to sign a loan agreement. This loan agreement specified that the Cosmosphere was accepting responsibility for NASA's artifacts and subjecting itself to the following conditions, terms and representations:

IMPORTANT: THESE REQUIREMENTS MUST BE READ. They are a part of the Exhibit Application. After completion, this page must be attached to the copy retained by the Sponsor [the Cosmosphere].

REQUIREMENTS

1. All questions on the Exhibit Application should be completed. If a question is not applicable, the response should state that fact.

2. NASA exhibits are available for professional, trade, civic, educational, or public service events. Use of NASA exhibits must give no unfair commercial advantage. This criterion normally rules out individual businesses and advertising uses, but not events that public relations firms organize for public service or educational sponsors.

3. There must be no admission fee charged for a NASA exhibit. Although a NASA exhibit may be part of a larger exposition that charges an admission fee, such as a state fair, it may not be the major attraction of such an event.

4. NASA exhibit requests for fund raising events benefitting a single organization or events sponsored by religious or political groups, are normally not approved.

5. The sponsor assumes all shipping expenses to and from the place of exhibition.

6. The sponsor shall provide suitable labor to unload, uncrate, set up and take down, crate and load aboard the common carrier. All other expenses including property insurance, adequate indoor storage of empty crates, daily exhibit maintenance, utility hookup, shall be borne by the sponsoring organization.

7. Title to the NASA exhibit furnished by the Government shall remain in the Government. The sponsor shall maintain adequate property control records of the Government-furnished exhibit in accordance with sound business practice.

8. During the period the NASA exhibit is in the custody of the sponsor, the sponsor will pay expenses relating to its operation, including maintenance and repair. During this period the sponsor assumes the risk of, and is responsible for, any loss of, or damage to, the exhibit except for reasonable wear and tear. (The sponsor will contact NASA before effecting any

repairs.)

9. The sponsor assumes responsibility for any liability, damages or injuries to persons or property arising out of, or in any way connected with, the sponsor's possession or use of the exhibit(s), and shall hold the Government harmless against any claims arising hereunder.

10. Federal law prohibits any member of, or delegate to the U.S. Congress, or Resident Commissioner, from sharing in or benefitting from this agreement.

11. When necessary, and at the expense of the sponsor, NASA will provide an Exhibits Specialist to supervise the uncrating, set-up and take-down of complex exhibits. The sponsor will be notified when it is necessary for an Exhibits Specialist to be on site.

12. Compliance with the Civil Rights Act of 1964, as amended, will be required as it applies.

13. The sponsor may be required to carry insurance covering loss or damage to the exhibit(s), persons, or property. The requirement of insurance and the minimum amount (if specified) will be shown in the Exhibit Loan Agreement. Insurance is required for exhibits loaned to state, county, municipal, and city entities, including organizations such as educational institutions established by those entities.

14. All exhibits shall be displayed indoors unless written exception is given. The specific location of exhibits will be agreed upon by the sponsor and NASA before the loan agreement is approved. Once finalized, approval must be granted by NASA before the exhibit can be moved to another location.

15. The sponsor shall not assign to another person or entity this agreement or any part of the rights under this agreement, except as otherwise agreed to by the United States in writing.

25. Periodically thereafter, NASA would send a followup exhibit loan agreement to the Cosmosphere. NASA required the Cosmosphere to sign this document verifying that the loaned artifacts were in the possession of the Cosmosphere.

26. The Cosmosphere did not receive title to the artifacts by virtue of the loan agreements. In addition, the Cosmosphere could not unilaterally dispose of NASA property without obtaining NASA's prior authorization.

27. On or about January 5, 1996, an official from NASA sent a "2-Way Memo" to the defendant concerning loan extensions. In this memo, the government official notified the defendant that NASA was updating its loan agreements. The defendant was asked to verify whether the Cosmosphere still had the items listed on the attached NASA Exhibits Loan Agreement. If these items were not being used, the defendant was told to indicate if future use was anticipated. If the items would not be used in the future, the defendant was instructed to arrange with NASA the return of the items. The memo stated that "no item should be placed in storage for any length of time."

28. On or about February 1, 1996, the Cosmosphere's curator faxed a letter to the NASA official stating that he needed to clarify the status on a few items. In the letter, the curator stated that some of NASA's artifacts were used for restoration projects at other museums. The curator inquired about the appropriateness of this and whether NASA remembered authorizing some or all of these projects. NASA responded on June 19, 1996, "[s]ince we have nothing in writing, from anyone, supporting that fact, we have no other alternative than to hold Max responsible for the items as he was the one who requested them

and is responsible for the items placed on loan to KCSC. Each updated loan agreement from NASA was signed, acknowledging that the items were still in place @ KCSC.”

29. On or about June 25, 1996, the Cosmosphere’s curator wrote a memo to the defendant regarding items he could not locate on the NASA Loan Agreement dated January 5, 1996. The curator listed 34 items he could not find in the Cosmosphere’s collection with comments concerning the artifacts’ possible whereabouts. These items included space food samples (“cannot locate this item in the tracking system, nor can we find on the shelves”), a Gemini instrument (same notation), an ITSLA PGA (Eagle) (“have the main suit, boots were sold at auction in 1995 and not recovered”), an In-flight Coverall Set (“shows sent to Russia”), five In-flight jackets (“cannot find on the shelves” or “cannot locate this item in the tracking system, nor can we find on the shelves”), three In-flight trousers (“cannot find on shelves” or “[t]raded to Alan Wise for Russian artifacts”), ART 2184/2865 Bio Belt Assembly (cannot find on shelves), two Film Canisters Maurer (“cannot locate this item in the tracking system, nor can we find on the shelves”), a Haze filter (same comment), Skylab food items (same comment), Survival Bars (only vanilla crispy bars missing), Vacuum Cleaner Blower Assembly (“to Howard Project”), Cover Layer Stafford (“to Cradle of Aviation”), In-flight Coverall Set (“to Yamahashi”), PGA Scott (“to Stafford”), Fisher Ball Point Pen (“to Little Rock”), two CCU Cables (“to Howard Project”), Mercury mockup suit and mannequin (“we have the suit, we don’t have the mannequin”), Oxygen Purge System, two Horizon Sensor Systems, one Skylab crewman shower, and two hand rail assemblies.

30. On or about August 21, 1996, NASA documented the Cosmosphere’s request that

the two items purportedly used in a Canadian exhibit be removed from their loan agreement as lost property. In NASA's documentation it was noted that NASA "pointed out to this sponsor, and emphasis placed on the fact, that they are responsible for the care, preservation and accountability of the items while on loan to them and that any future movement of those items from KCSC must be documented with written authorization by a representative of NASA."

31. On or about September 30, 1996, the defendant wrote a letter to the NASA official concerning the 1996 Loan Agreement. In the letter the defendant stated that he was enclosing a signed loan agreement for the artifacts on loan to the Cosmosphere. The defendant stated that the "[w]e have spent the last five to six months conducting an extensive hands-on inventory to verify the items on the loan agreement." The defendant was "happy to say that we were able to confirm all of the items except two." These two items were supposedly used in a project with a Canadian museum.

32. On or about March 5, 2001, NASA sent a continuing exhibit loan agreement to the Cosmosphere. This loan agreement covered 273 listed items which NASA agreed to loan the Cosmosphere for an indefinite period of time. NASA asked the Cosmosphere to verify the existence of the artifacts in the Cosmosphere's Hutchinson collection. It was the duty and responsibility of the Cosmosphere to reconcile the loan agreement with their inventory of artifacts and then sign the agreement to represent their possession of the artifacts. On or about April 4, 2001, the defendant signed the loan agreement certifying that all of NASA's artifacts were in the custody of the Cosmosphere and being maintained pursuant to the terms,

conditions and representations in the application.

33. Prior to the spring of 2003, the defendant was responsible for the Cosmosphere's inventory and signed most of the loan agreements. Specifically, signing the agreements with NASA dated February 21, 1984, August 1, 1986, January 4, 1988, January 3, 1989, January 3, 1990, January 5, 1996, July 27, 1999, March 5, 2001, representing that NASA's artifacts were in the possession, custody and control of the Cosmosphere.

Collections Management Policy

34. The term "deaccess" or "deaccession" refers to the process by which the Cosmosphere would remove or dispose of artifacts in its collection.

35. On or about July 17, 2000, the defendant informed the Cosmosphere's Board of Directors that a committee needed to be formed to establish a new collections management policy. The defendant said the development of a new policy was important because collections "are the backbone of the KCSC organization, and collections must always be safeguarded, valued, and have a criteria for deaccessioning." The defendant further advised the Board that "[t]here are legal implications to consider when dealing with NASA artifacts, therefore, a policy with proper procedures must be in place."

36. On or about August 21, 2000, the Collections Management Policy was presented to the Board of Directors. This policy was approved by the Board with the additional representation from the defendant that a "100 percent physical inventory would be conducted in the Collections Department and the board would receive a collections activity report no less frequently than annually from the Cosmosphere staff." The Board "felt the submitted

policy and the decision tree would provide the proper check and balance necessary for safeguarding the Cosmosphere's comprehensive collection."

37. The new Collections Management Policy provided, in relevant part:

10.104 Ethics and personal collecting

The KCSC personnel who are directly responsible for acquiring objects for the collections are prohibited from dealing (buying and selling for profit on a regular basis or maintaining an interest in such a dealership) in objects or artifacts similar to those collected by the museum. Any exceptions to this policy must be submitted in writing and approved by the President/CEO. Personal collecting of such objects or artifacts by staff members is permitted. Staff members will not compete with the KCSC's collecting activities. Current staff members must submit annually to the Senior Curator a signed Employee Personal Collection Verification Form, which will include an updated list of any personal collection of objects or artifacts similar to those collected by the museum. All new staff members will be required to complete the Employee Personal Collection Verification Forms will be filed in individual personnel files.

....

10.203 Deaccessioning and disposition of objects

Methods of Transfer/Disposal

1. Priority One

a) Exchange-the formal reciprocal transfer of objects of comparatively equal value between two or more institutions.

b) Sale-the formal sale of objects to another institution.

NOTE: All proceeds realized from the sale of items removed from the collection will be allocated to support collection acquisition,

preservation, restoration and conservation.

c) Transfer-the transfer of the objects to the KCSC's exhibit or education division.

2. Priority Two

a) Sale-if objects are offered for sale, primary consideration will be given to public auction or the public marketplace. Sealed or open bidding are acceptable options, provided that the availability of sale item has been given to appropriate potential purchasers. In the case of equivalent offers, the successful bidder will be determined by the Senior Curator and President/CEO.

Deaccessioned objects will not be given or sold directly to the KCSC staff.

NOTE: All proceeds realized from the sale of items removed from the collection will be allocated to support collection acquisition, preservation, restoration and conservation.

3. Priority Three

a) Destruction-destruction is defined as the obliteration of an object.

The NASA Omega Mock-up Watch

38. Sometime prior to January of 2000, the exact date being unknown to the Grand Jury, the Cosmosphere loaned several artifacts to a space exhibit in the Philippines. The Cosmosphere became aware that some of these items were lost or damaged when some of the items were returned on or about April 1998. The items loaned to the Philippine exhibit included: a Shuttle In-flight garment, a Russian Soyuz Space Suit, American Space Food (five packages), an Apollo Liquid Cooling garment, a Beta cloth stowage bag, an Omega

mock-up watch, an astronaut ink pen, a Gemini spacesuit, an Apollo In-flight garment.

39. The Omega astronaut watch was a mock-up watch that the Cosmosphere had received pursuant to an exhibit loan agreement from NASA.

40. Pursuant to the terms of NASA's exhibit loan agreements, the Cosmosphere was required to insure NASA's artifacts. Consequently, unbeknown to NASA, the Omega mock-up watch was insured by the Cosmosphere and the Philippine exhibit through the Oriental Assurance Corporation.

41. Sometime before January 11, 2000, the Cosmosphere requested payment for the damage or loss of property on loan to the Philippine exhibit, including NASA's Omega mock-up watch.

42. On or about January 11, 2000, the defendant received a letter from a representative of McLarens Toplis of North America, Inc. McLarens is in the business of international loss adjusting with its primary place of business in New Orleans, Louisiana. This letter confirmed the Cosmosphere's claim for a loss under the insurance policy, as well as describing a visit to the Cosmosphere by a representative of McLarens on or about January 10, 2000, to examine the damaged artifacts.

43. On or about February 23, 2000, the defendant sent a letter to Mr. Alberto Rizzo of McLarens Toplis via UPS Next Day Air. The defendant stated that he was enclosing information regarding the "damaged and lost space artifacts that resulted from our support of the exhibition in the Philippines." The enclosed information, referred to by the defendant, listed each artifact with its original estimated value, the current value and the amount of the

defendant's claim. The claim stated that the Omega watch had a value of \$25,000.00.

44. Sometime during December of 2000 through January of 2001, Oriental Assurance Corporation and the Cosmosphere settled the insurance claim for approximately \$55,000.00.

45. On or about January 29, 2001, a representative of the Cosmosphere faxed a "Release of Claim" to the Oriental Assurance Corporation as part of its settlement of the insurance claim.

46. On or about February 6, 2001, pursuant to the settlement, \$54,982.00 was wired into the trust account of an attorney for the Cosmosphere. The attorney obtained a cashier's check dated February 7, 2001, in the amount of \$53,882.00 which was mailed on the same day to the Cosmosphere. The defendant, as president and CEO, authorized the deposit of the insurance proceeds into the Cosmosphere's bank account.

47. The defendant did not notify NASA about the loss of the watch. The defendant did not relinquish the insurance proceeds received from the insurance settlement to NASA in return for the loss of the Omega mock-up watch.

48. On or about April 4, 2001, the defendant signed and thereafter submitted documentation to NASA certifying that the Omega mock-up watch was in the possession of the Cosmosphere.

The Grand Jury charges:

Count 1
Wire Fraud
Title 18, United States Code, Section 1343

The Grand Jury realleges and incorporates by reference paragraphs 1 through 48 of

the Introduction to this Indictment as though set forth in full herein.

On or about January 29, 2001, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, for the purpose of executing a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses and representations, did knowingly devise and intend to devise a plan which caused to be transmitted in interstate commerce by means of wire communications certain writings, signs, signals and sounds which transmitted a faxed message to Oriental Assurance Corporation that the Cosmosphere was releasing any additional claim under the insurance policy pursuant to Oriental Assurance Corporation's agreement to pay approximately \$55,000.00 in damages and loss.

In violation of Title 18, United States Code, Section 1343.

Count 2
Mail Fraud
Title 18, United States Code, Section 1341

The Grand Jury realleges and incorporates by reference paragraphs 1 through 48 of the Introduction to this Indictment as though set forth in full herein.

Beginning on or about February 6, 2001, and continuing through February 9, 2001, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, having devised a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations, and in order to effect the scheme and artifice, did knowingly and willfully cause a thing and matter to be sent and

delivered by the United States Postal Service, in interstate commerce, according to the directions thereon, that is, the defendant submitted and caused another to submit a claim for insurance to Oriental Assurance Corporation which caused the mailing of a check to the Cosmosphere in settlement of the claim for the purpose of obtaining money.

In violation of Title 18, United States Code, Section 1341.

The Grand Jury alleges:

Superior Galleries

49. Superior Galleries Inc. (Superior), also d/b/a A-Mark Auction Galleries, Inc., was an auction house located in California.

50. A person who wanted to list an item in an auction would sign a consignment agreement representing that the seller had title and proper authority to consign an item to Superior for auction. Superior lists the item in a catalog with other items for auction. This publication contains pictures of the items, brief descriptions and estimated values. These would be distributed to interested parties who would later have the opportunity to bid on the items.

51. Beginning as early as 1999, the defendant established two accounts with Superior. One account was in the name of the Cosmosphere. It was designated as KAN314. This account was used to sell items on behalf of the Cosmosphere. The proceeds from sales conducted through this account were mailed to the Cosmosphere and deposited into its bank

account.

52. The second account was the defendant's personal account. It was referred to as ARY367. This account was used by the defendant to sell objects and artifacts. The proceeds from sales conducted through this account were mailed to the defendant and deposited into his personal or business bank accounts.

The 1999 Auction

53. In 1999, the defendant notified Superior that he had numerous items to sell through an auction scheduled for October 23 through 24, 1999. Using his account, designated ARY367, the defendant offered 24 items for sale. Twenty-two items were actually sold for approximately \$42,350.00, and two items were returned. After the payment of the commission, the total amount received for these items was approximately \$37,782.00.

54. Superior paid the defendant with four checks which were mailed to the defendant's residence in Hutchinson, Kansas. Check number 15493, in the approximate amount of \$12,150.00, was deposited into the defendant's bank account on December 18, 1999. Check number 15594, in the approximate amount of \$8,757.00, was deposited into the defendant's bank account on December 31, 1999. Check number 15754, in the approximate amount of \$13,995.00, was deposited into the defendant's bank account on January 29, 2000. Check number 15655, in the approximate amount of \$2,880.00, was deposited into the defendant's account on January 29, 2000.

55. Numerous items sold at this auction by the defendant were listed on the books and records of the Cosmosphere as property acquired by the Cosmosphere. These items include

the following: a nose cone, a NASA Silk Screen, a photographic spot meter, an RX-3 spacesuit components, Apollo 8 silk screens, an Apollo 11 silk screen, a flown Apollo 13 bus bar battery cable, a flown sextant crown assembly, an In-flight crew shirt, and an Air Force One control panel. (The term “flown” explains that the item was actually flown or used in a space mission.)

56. In addition, the defendant sold a flown “Noun 70 Code” panel for approximately \$3,400.00. This was an item loaned to the Cosmosphere by NASA and subject to the loan agreement.

57. On or about April 4, 2001, the defendant signed and mailed a document to NASA representing that this panel was still in the Cosmosphere’s collection pursuant to the terms of the exhibit loan agreements.

58. NASA did not authorize the defendant to transfer, sale or dispose of the flown “Noun 70 Code” panel.

59. The defendant was not authorized by the Cosmosphere to convert for his own benefit Cosmosphere property or property loaned to the Cosmosphere by NASA.

The May 2000 Auction

60. Sometime prior to May of 2000, the defendant notified Superior that he had numerous items to sell through a scheduled auction on May 6 through 7, 2000. Between February 1, 2000, and March 22, 2000, the defendant sent these items to Superior via UPS.

61. Using his account, designated ARY367, the defendant sold 9 items in this auction. The total amount received for these items was approximately \$50,730.00. After the payment

of the commission, Superior mailed the defendant a check dated June 19, 2000, for approximately \$45,657.00. The defendant deposited and caused the deposit of this check into his personal bank account on or about June 28, 2000.

62. Numerous items sold by the defendant in this auction were listed on the books and records of the Cosmosphere as property it acquired. Those items include the following: a flown Apollo 12 water shut-off valve, a rotation controller, a purge valve for spacesuit, and a film canister.

63. The defendant also sold an item on loan to the Cosmosphere from NASA. This item was an Apollo 15 DDR tape which sold for approximately \$2,200.00.

64. On or about January 13, 2000, and April 4, 2001, the defendant signed and mailed documents to NASA representing that the Apollo 15 DDR tape was still in the Cosmosphere's collection pursuant to the terms of the exhibit loan agreements. However, the Cosmosphere's deaccession record for the DDR tape, signed by the defendant, reflects that the defendant "deaccessed" the tape on March 27, 2000, or May of 2000, even though this same document stated that the ownership for the tape was the "Natl Aeronautics & Space Admin."

65. NASA did not authorize the defendant to transfer, sale or dispose of the Apollo 15 DDR tape.

66. The defendant was not authorized by the Cosmosphere to convert for his own benefit Cosmosphere property.

The Grand Jury charges:

Counts 3 through 5
Theft of Government Property, Mail Fraud and
Interstate Transportation of Stolen Property
Title 18, United States Code, Sections 641, 1341 and 2314

Count 3

The Grand Jury realleges and incorporates by reference paragraphs 1 through 66 of the Introduction to this Indictment as though set forth in full herein.

Beginning on or about April 6, 2000, and continuing through May 6, 2000, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, did embezzle, steal, purloin and knowingly convert to his use and the use of another, and without authority sold, conveyed and disposed of a thing of value of the United States and a department and agency thereof, that is, the defendant sold an Apollo 15 DDR tape that was the property of the National Aeronautic and Space Administration.

In violation of Title 18, United States Code, Section 641.

Count 4

The Grand Jury realleges and incorporates by reference paragraphs 1 through 66 of the Introduction to this Indictment as though set forth in full herein.

Beginning on or about June 19, 2000, and continuing through June 28, 2000, in the

District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, having devised a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations, and in order to effect the scheme and artifice, did knowingly and willfully cause a thing and matter to be sent and delivered by the United States Postal Service, in interstate commerce, according to the directions thereon, that is, the defendant fraudulently caused another to use the United States Postal Service to mail a check to the defendant for the purpose of defrauding and fraudulently obtaining money for the defendant.

In violation of Title 18, United States Code, Section 1341.

Count 5

The Grand Jury realleges and incorporates by reference paragraphs 1 through 66 of the Introduction to this Indictment as though set forth in full herein.

Beginning on or about April 5, 2000, and continuing through May 6, 2000, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, did unlawfully transport, transmit, transfer and cause to be transported, transmitted and transferred in interstate commerce from Kansas to California, stolen goods, wares and merchandise, that is, items owned by NASA and the Cosmosphere, of the value of \$5,000.00 and more, knowing the same to have been stolen.

In violation of Title 18, United States Code, Section 2314.

The Grand Jury alleges:

The October 2000 Auction

67. On or about August 25, 2000, the defendant faxed a cover sheet with a 17 page attachment to a representative of Superior in California. One of the attached pages was a letter dated August 11, 2000. In this letter, the defendant informed Superior that he was sending a list of 34 space artifacts to be shipped to Superior that day by UPS. The defendant commented that the two boxes should arrive in California on Monday. The defendant further stated that none of the items in this group came from the Cosmosphere. All of the artifacts came from one of three different groups: a former Rockwell lead Apollo project engineer, a widow of a deceased NASA official and/or an ex-wife of an Apollo astronaut. These people, according to the defendant, consigned the items to him for sale. The defendant instructed Superior to send all correspondence and payments to him at his residence.

68. On or about October 10, 2000, Superior mailed the defendant an “Owner Master Listing” of the items he consigned to the Fall 2000 Space Memorabilia Auction. This list included 35 items with an insured value of approximately \$74,250.00.

69. Actually 36 items were mailed to Superior for this auction. Some of the items included in this sale were: a lunar night lens, a lunar day lens, a space suit pressure gauge, a flown environmental control system metal shims, Gene Cernan’s beta cloth Apollo suit connector cover, a flown glycol storage reservoir, a flown photographic timing cable, a flown temporary stowage bag, 70mm film from Apollo 16, and a flown command module control panel #201.

70. It has been determined that of these 36 items (1) 18 items were transferred from NASM to the Cosmosphere, (2) four items were obtained by the Cosmosphere from GSA or Federal Surplus, (3) one item was on loan from International Space Hall of Fame, (4) one item was manufactured by the Cosmosphere, and (5) no documentation or source information has been found for the remaining items at the time of this Indictment.

71. One of the 36 items was returned. The total amount received for the remaining 35 items was \$55,150.00. After the payment of the commission, the defendant received two checks from Superior in the amounts of \$7,578.00 and \$42,057.00. The defendant caused these checks to be deposited into his bank accounts on January 6, 2001.

72. The defendant was not authorized by the Cosmosphere to convert for his own benefit Cosmosphere property.

Counts 6 through 7
Mail Fraud and
Interstate Transportation of Stolen Property
Title 18, United States Code, Sections 1341 and 2314

Count 6

The Grand Jury realleges and incorporates by reference paragraphs 1 through 72 of the Introduction to this Indictment as though set forth in full herein.

On or about October 10, 2000, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, having devised a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations, and in order to effect the

scheme and artifice, did knowingly and willfully cause a thing and matter to be sent and delivered by the United States Postal Service, in interstate commerce, according to the directions thereon, that is, the defendant fraudulently caused another to use the United States Postal Service to mail a Owner Master Listing from the Fall 2000 Space Memorabilia Auction to the defendant for the purpose of defrauding and fraudulently obtaining money for the defendant.

In violation of Title 18, United States Code, Section 1341.

Count 7

The Grand Jury realleges and incorporates by reference paragraphs 1 through 72 of the Introduction to this Indictment as though set forth in full herein.

Beginning on or about August 11, 2000, and continuing through October 29, 2000, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, did unlawfully transport, transmit, transfer and cause to be transported, transmitted and transferred in interstate commerce from Kansas to California, stolen goods, wares and merchandise, that is, items owned by the Cosmosphere, of the value of \$5,000.00 and more, knowing the same to have been stolen.

In violation of Title 18, United States Code, Section 2314.

The Grand Jury alleges:

The May 2001 Auction

73. On or about February 28, 2001, the defendant caused 31 artifacts to be mailed from the Cosmosphere in Kansas to Superior in California for an auction to be held on May 5 through 6, 2001.

74. On or about February 28, 2001, the defendant faxed to Superior a cover document and a master listing with descriptions of the items the defendant wanted to offer for sale in the auction.

75. The defendant sold 26 items for approximately \$51,434.00 during this auction.

76. The items sold in this auction included: a flown Fisher pen, two In-flight garment boots, a signal conditioner, a Kansas flag, a spacesuit checklist, a lunar sample bag, a single axis auto collimator, a rucksack no. 1, a Cosmosphere produced acrylic from Jim Lovell's couch.

77. The signal conditioner belonged to NASA and was on loan to the Cosmosphere. The flown Fisher pen was purchased by the Cosmosphere from GSA and Federal Surplus. The Kansas flag was donated by Charles Duke to the Cosmosphere. The five remaining items were obtained by the Cosmosphere from NASM. There was no documentation or source information available for the remaining items at the time of this Indictment.

78. Superior mailed three checks to the defendant in Kansas in payment for the sale of these artifacts. The checks were deposited into the defendant's personal bank accounts on July 2, July 13 and August 20 of 2001.

Charles Duke

79. The Board minutes for February 21, 2000, reflect that the defendant reported that Charles Duke gave the Cosmosphere a “potentially lucrative gift.” Mr. Duke donated 10 Kansas flags carried to the lunar surface during the Apollo 16 mission. The defendant reported that similar artifacts recently sold at auctions for as much as \$30,000.00. The minutes stated that “[t]he donation has been given to the Cosmosphere with no restriction on how the collection is to be used.”

The Investigation

80. During the spring of 2003, the Johnson Space Center’s Exhibits Manager contacted the Cosmosphere to renew NASA’s exhibit loan agreement. This loan agreement required the Cosmosphere to certify that the NASA loaned artifacts were in the possession of the Cosmosphere and being actively displayed.

81. The current president of the Cosmosphere received the loan agreement, and signed it with the understanding of the NASA Exhibits Manager that the Cosmosphere had not yet verified that all of NASA’s artifacts were still in the possession of the Cosmosphere. However, the NASA Exhibits Manager was told that the Cosmosphere would follow up by conducting an inventory and audit of artifacts.

82. During this internal audit of artifacts, Cosmosphere staff discovered irregularities in the museum’s collection. A full inventory revealed that a significant number of artifacts owned by NASA and the Cosmosphere were missing or appeared to have been handled improperly. Specifically, it was discovered that many such items were sold at private auctions for the financial benefit of the defendant.

83. In summary, 26 NASA loaned items were missing from the Cosmosphere. These artifacts are described as follows: an Omega mock-up watch (loaned to the Phillippines), two CCU Cables (loaned to the Apollo 13 movie project), a vacuum cleaner blower assembly (loaned to the Apollo 13 movie project), an In-flight coverall set (loaned to Yamanashi), A7LB boots (traded, information unknown), Skylab survival bars (unknown location), two Apollo In-flight trousers (one traded to Graham Philpotts in June 1993; one traded to Alan Wise, August 1994), two Apollo In-flight jacket (one traded to Russia, January 1994; one traded to Alan Wise, January 1994), vanilla crispy bars (traded to Graham Philpotts), a pair of boot covers (sold at Superior Auction, May 2000, through the Cosmosphere's account), an A7LB cover layer (sold at Superior Auction, May 2000, through the Cosmosphere's account), a urine collection transfer assembly (sold at Superior Auction, May 2000, through the Cosmosphere's account), Data Recorder Reproducer Tape (sold at Superior Auction, May 2000, through the defendant's personal account), a bio-electrode cardiograph signal conditioner (sold at Superior Auction, May 2001, through the defendant's personal account), two In-flight trousers (unknown), In-flight jacket (unknown), a CWG electrical harness (unknown), assorted food (unknown), an A7L cover layer (defendant loaned to Cradle of Aviation Museum), an Apollo A7LB spacesuit-PGA and cover layer (defendant loaned to Kirkpatrick Center/Omniplex), fecal containment system (defendant loaned to Kirkpatrick Center/Omniplex), and a urine collection transfer assembly (defendant loaned to Kirkpatrick Center/Omniplex).

84. Six of these 26 items were sold by the defendant. Three were sold through his

personal account (ARY367) for approximately \$10,600. The other three items were sold by the defendant on the Cosmosphere's account (KAN314) for approximately \$22,000.

85. Five of the NASA missing items were loaned out to others by the defendant, without NASA authorization, and never returned. Three were loaned to the creators of the movie "Apollo 13." The fourth item was loaned as an exhibit to the Philippines. The fifth item was loaned to a private individual in Japan.

86. Seven NASA items were traded to other individuals by the defendant or others acting on his behalf.

87. Five of NASA's loaned items are missing with no documentation concerning their whereabouts.

88. Four of NASA's items are currently on loan and being displayed by other museums: one item at the Cradle of Aviation in Long Island, New York, three items on loan to the Omniplex in Oklahoma City, Oklahoma.

89. The defendant deprived the Cosmosphere and its Board of Directors of his loyal and honest services. He intentionally utilized his trusted position to obtain a benefit for himself at the expense of the Cosmosphere whose trust he betrayed.

Counts 8 through 10
Theft of Government Property, Wire Fraud and
Interstate Transportation of Stolen Property
Title 18, United States Code, Sections 641, 1343 and 2314

Count 8

The Grand Jury realleges and incorporates by reference paragraphs 1 through 89 of

the Introduction to this Indictment as though set forth in full herein.

Beginning on or about February 28, 2001, and continuing through May 6, 2001, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, did embezzle, steal, purloin and knowingly convert to his use and the use of another, and without authority sold, conveyed and disposed of a thing of value of the United States and a department and agency thereof, that is, the defendant sold a signal conditioner that was the property of the National Aeronautic and Space Administration.

In violation of Title 18, United States Code, Section 641.

Count 9

The Grand Jury realleges and incorporates by reference paragraphs 1 through 89 of the Introduction to this Indictment as though set forth in full herein.

Beginning on or about February 28, 2001, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, for the purpose of executing a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses and representations, did knowingly devise and intend to devise a plan which caused to be transmitted in interstate commerce by means of wire communications certain writings, signs, signals and sounds which transmitted from the defendant in Kansas to Superior Galleries in California a cover document and a master listing with descriptions of the items the defendant offered for sale.

In violation of Title 18, United States Code, Section 1343.

Count 10

The Grand Jury realleges and incorporates by reference paragraphs 1 through 89 of the Introduction to this Indictment as though set forth in full herein.

Beginning on or about February 28, 2001, and continuing through May 6, 2001, in the District of Kansas, and elsewhere,

MAX L. ARY,

the defendant herein, did unlawfully transport, transmit, transfer and cause to be transported, transmitted and transferred in interstate commerce from Kansas to California, stolen goods, wares and merchandise, that is, items owned by NASA and the Cosmosphere, of the value of \$5,000.00 and more, knowing the same to have been stolen.

In violation of Title 18, United States Code, Section 2314.

Count 11

As a result of committing the foregoing offenses alleged in counts 1 through 10 of this Indictment, the defendant,

MAX L. ARY,

shall forfeit to the United States pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offense, including but not limited to the following:

i. Money Judgment

A sum of money equal to any and all proceeds representing the amount of proceeds obtained as a result of the offenses in counts 1 through 10, for which the defendant

is liable.

All in violation of Title 18, United States Code, Section 981, and Title 28,
United States Code, Section 2461.

A TRUE BILL

DATE

FOREMAN OF THE GRAND JURY

ERIC F. MELGREN
United States Attorney
1200 Epic Center
301 N. Main
Wichita, KS 67202
(316) 269-6481
Ks. S.Ct. No. 12430

(It is requested that trial be held in Wichita, Kansas.)

Returned in open court this _____ day of April, 2005.

UNITED STATES DISTRICT/MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---------------------------|---|------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | Criminal Action |
| |) | |
| v. |) | No. 05-_____-01-____ |
| |) | |
| MAX L. ARY, |) | <u>Counts 1, 9</u> |
| |) | 18 U.S.C. §1343 |
| |) | |
| Defendant. |) | <u>Counts 2, 4, 6</u> |
| _____ |) | 18 U.S.C. §1341 |
| | | |
| | | <u>Counts 3, 8</u> |
| | | 18 U.S.C. §641 |
| | | |
| | | <u>Counts 5, 7, 10</u> |
| | | 18 U.S.C. §2314 |
| | | |
| | | <u>Count 11</u> |
| | | 18 U.S.C. §981 |

PENALTIES

Counts 1, 2, 4, 6 and 9: A term of imprisonment not to exceed 20 years, a fine not to exceed \$250,000, or both.

Counts 3, 5, 7, 8, 10: A term of imprisonment not to exceed 10 years, a fine not to exceed \$250,000, or both.

Count 11: Forfeiture.